Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

No. 99-231

ELBA LLAMPALLAS,
Petitioner,

v.

MINI-CIRCUITS LAB., INC., MINI CIRCUITS LAB., INC. by and through its Assignee, DONALD KAPLAN, and PALMETTO EXTRA CONDOMINIUM ASSOCIATION, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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September 7, 1999

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Petitioner asks this Court to grant review of a decision that applies well-settled legal principles to a highly unusual, if not unique, factual situation. In so doing, she conjures up supposed conflicts between the Eleventh Circuit's ruling and prior decisions of this Court and the Ninth Circuit, by mischaracterizing the reasoning of the court below and by ignoring the facts that make this case unique. Because petitioner's effort to manufacture a basis for a grant of certiorari is unpersuasive, the petition should be denied.

STATEMENT OF THE CASE

This case arose after the termination of a thirteen-year domestic partnership, shared by two women who worked together at respondent Mini-Circuits, Inc. Marta Blanch was number two in the hierarchy at Mini-Circuits, a small manufacturing concern in Florida. Petitioner Ella Llampallas was number three. Pet. App. 34. Their terminated relationship led to a great deal of friction in the workplace, including, according to testimony credited by the district court, threats by Blanch that if petitioner did not resume the relationship she would be fired. Pet. App. 35. Eight months after the break-up, on the occasion of an altercation with petitioner, Blanch called the owner and President of Mini-Circuits, Harvey Kaylie, who resided in New York, and stated that she was quitting because she could no longer work with petitioner. Kaylie told her not to resign and called petitioner to New York for a meeting. *Id.* At that meeting, petitioner never talked about the source of the friction between the two women and never mentioned that she had been threatened with dismissal. Pet. App. 27. Indeed, until this suit was filed, Kaylie never had any knowledge of the nature of the prior relationship between petitioner and Blanch, and never heard about any threats made by Blanch after the relationship ended. Pet. App. 29-30 & n.24.

Kaylie's response to the situation presented to him was to propose that petitioner take over management of an additional company facility to be opened soon in Florida. Until that could happen, he placed petitioner on leave with full pay, and flew her to New York on several occasions over the next six months for training related to her new position. Petitioner also undertook a search for a new location for the proposed facility. Pet. App. 37. Eventually, however, Kaylie determined that the

new facility was not economically justified and notified petitioner that her employment had been terminated. Pet. App. 38.

Petitioner brought suit under Title VII, claiming that the termination was actionable "quid pro quo" sexual harassment. After a bench trial, the district court ruled in favor of petitioner and awarded $1.7 million in "back pay" and "front pay." In so ruling, the district court did not suggest that Kaylie had any illegitimate intent. To the contrary, it specifically found that the sole motivation for Kaylie's decision to suspend and later terminate petitioner was his desire to keep his most valuable employee, Marta Blanch, from quitting. Pet. App. 44.

The district court also never made a finding that Blanch's resignation was a ploy designed by Blanch to cause Kaylie to fire petitioner. To the contrary, in its conclusions of law, the court stated that Blanch's resignation was "[d]ue to the fact that Blanch could not work with [petitioner] once they were no longer lovers." Pet. App. 44. "This," the court added, "*in effect*, forced Kaylie to choose between the two women." *Id.* (emphasis added). But the court nevertheless determined that Mini-Circuits was strictly liable for sexual harassment based on five factors: (1) that petitioner is a woman, (2) that Blanch made threats of termination if petitioner did not resume a sexual relationship, (3) that those threats were based on petitioner's gender and sexual orientation, (4) that petitioner was ultimately terminated by Kaylie, after a chain of events that began when Blanch tried to resign, and (5) that Blanch is a supervisor. *Id.*

The Eleventh Circuit reversed. Analyzing the unusual situation presented in this case, the court went back to first principles, applying the three basic elements of a Title VII intentional discrimination claim: (1) discriminatory animus, (2)

an alteration in the terms and conditions of employment by the employer, and (3) a causal link between the two. Pet. App. 18 (citing cases). It noted that in the usual case, where "an employee of the defendant has 'sexually harassed' the plaintiff, and the harassing employee then takes a 'tangible employment action' against the plaintiff," Pet. App. 19-20, it is relatively easy to infer that the employee harbored discriminatory animus and was motivated by that animus in taking the tangible employment action. Pet. App. 20-22. But the court added that the "causal link" between animus and action is far less automatic where, as here, the person with the animus is not the person who takes the action, and the latter has no knowledge of any inappropriate threats or motives on the part of the former.

Here, the court noted, the district court's own findings make clear that "when Kaylie terminated [petitioner's] employment, he did so *because he wished to retain Blanch*," and not because he harbored any inappropriate or discriminatory motives or feelings. Pet. App. 25 (emphasis in original). It then held that, based on all the circumstances presented, there was an insufficient causal link between the animus of Blanch and the action taken by Kaylie. In so ruling, the court distinguished cases in which the decisionmaker was a mere "cat's paw," with no choice but to carry out the "recommendation" of the person in the workplace harboring discriminatory animus. "In the cat's paw situation," the court stated, "the harasser clearly causes the tangible employment action, regardless of which individual actually signs the employee's walking papers." Pet. App. 26. But this case, the court held, is quite different, because Blanch communicated no decision or recommendation to Kaylie suggesting that any sort of action be taken against petitioner. "The only 'decision' Blanch made was to quit Mini-Circuits because she 'couldn't work with [petitioner] anymore." Pet. App. 27.

The court recognized that Blanch may have resigned in order to "manipulate the company" into firing petitioner. *Id.* But it did not need to decide whether a company can be held liable because of a decisionmaker's immediate "unwitting compliance" with such manipulation. Here, instead of firing petitioner as a direct response to Blanch's possibly strategic ploy of resigning, Kaylie called petitioner to a meeting, where petitioner disclosed "neither her sexual relationship with Blanch" nor "developments upon the demise of that relationship." *Id.* Kaylie then went to considerable trouble and expense in an unsuccessful effort to find a separate slot for petitioner that would allow the company to keep both women as employees. The court held that "Mini-Circuits, through Kaylie, 'broke the chain' of causation between Blanch's harassment and its decision to terminate [petitioner's] employment both because it behaved reasonably in response to Blanch's threat to quit, and because [petitioner] herself failed to avoid the consequences of that threat." Pet. App. 29.

Prior to issuing its opinion, the Eleventh Circuit received supplemental briefing on the impact of this Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998), and *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998). It cited and discussed those decisions repeatedly in the opinion, concluding that they in no way mandated affirmance of a claim based on the facts presented here.

ARGUMENT

The ruling below involves no issue of general or continuing importance and does not conflict in any way with the prior rulings cited by petitioner. The highly unusual question presented here is whether a termination is a form of actionable sexual harassment where (1) it is ordered by a supervisor who has no knowledge of any prior threats and

whose only motive is a legitimate desire to retain another valued employee who has tried to resign, (2) that supervisor gave the plaintiff a full opportunity to explain the situation to him but she did not, and (3) that supervisor kept the plaintiff on the payroll for six months while trying to arrange alternate employment for her before reluctantly ordering the termination. A case involving such facts, by its very nature, will have little impact on the lower courts' handling of the more usual types of sexual harassment claims. Moreover, the suggestion that the issues raised here were addressed in a conflicting way by this Court and the Ninth Circuit in recent cases is insupportable. The petition accordingly should be denied.

I. The Eleventh Circuit's Ruling is Entirely Consistent with *Burlington* and *Faragher*.

The essence of the Eleventh Circuit's ruling was that a termination cannot be said to have been caused by discriminatory animus where (1) the person who uttered threats linked to demands for a sexual relationship, and who accordingly can be inferred to have had discriminatory motives, did not order or even recommend the termination, (2) the decisionmaker who ordered the termination had no knowledge of the threats, was solely motivated by a desire to retain another more valuable employee, had previously given the plaintiff a full opportunity to explain the situation, and had tried for several months to find a way to retain both employees. Petitioner's primary argument is that this ruling conflicts with *Burlington* and *Faragher*. That argument is completely unpersuasive. Those cases did not involve facts remotely resembling this case. Moreover, the underlying legal principles enunciated by this Court in no way contradict the reasoning of the Eleventh Circuit.

In both *Burlington* and *Faragher*, the conduct plaintiff was complaining about was ongoing, pervasive harassment by specified supervisors -- *i.e.*, what the Court repeatedly called "misuse of supervisory authority." *Burlington*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2292. The issue in those cases was under what circumstances an employer is vicariously liable for such abuse of authority granted to a supervisor. The Court held that where the offending conduct was that of a supervisor misusing delegated authority, an employer is strictly liable for the acts of its "agent." *Burlington*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2292-93.[1]

Here, the issue is different. The *sole* conduct about which petitioner complained -- her termination -- was not ordered by the "harassing" supervisor; it was ordered by a company president who had no illegitimate animus whatsoever. The issue in this case is not vicarious liability for "misuse of supervisory authority," but whether the action at issue -- the termination ordered by an entirely "innocent" company president -- violated Title VII in the first place. As to that issue, *Burlington* and *Faragher* offer no support for petitioner's position.

Petitioner points to language in *Burlington* holding that employers are vicariously liable, with no affirmative defense based on the existence of a grievance procedure, "when the supervisor's harassment *culminates* in a tangible employment action, such as discharge." 118 S. Ct. at 2270 (emphasis added). She argues that her discharge was the "culmination" of Blanch's harassment. Pet. at 6. As she acknowledges,

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[1]The Court also recognized an affirmative defense in cases where no tangible adverse employment action has been taken, if the employer has in place a suitable grievance system. *Burlington*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2292-93.

however, the Eleventh Circuit specifically addressed this language, and concluded that this Court did not intend the term "culminates" to bring within the ambit of the strict liability rule those adverse actions (like petitioner's termination) that are *not* the result of any misuse of supervisory authority. Pet. App. 28 n. 23 ("we believe that the Court means to limit the exception to those cases in which the harasser acts *as the decisionmaker with respect to the action*, either in actuality or by using another as its 'cat's paw'") (emphasis added).[2]

That analysis is plainly correct. In several other places in the opinion, this Court stated that strict liability arises only when a *tangible adverse action* is taken directly *by the harassing supervisor*. *See, e.g.*, 118 S. Ct. at 2269 ("When a supervisor *makes a tangible employment decision*, there is assurance the injury could not have been inflicted absent the agency relation.") (emphasis added); *id.* ("The supervisor has been empowered by the company as a distinct class of agent to *make economic decisions* affecting other employees under his or her control.") (emphasis added); *id.* ("For these reasons, a tangible employment action *taken by the supervisor* becomes for Title VII purposes the act of the employer.") (emphasis added).

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[2]As noted above, the Eleventh Circuit had previously explained the difference between the "cat's paw" category of cases and this case:

> This, however, is not a cat's paw case. Kaylie's decision to suspend and discharge Llampallas was not simply a tacit approval of Blanch's own decision to do the same. Blanch communicated no adverse employment decision regarding Llampallas to Kaylie for his review; nor did she recommend that Kaylie take action against Llampallas. The only "decision" Blanch made was to quit....

Pet. App. 27.

More fundamentally, it would make no sense to expand strict liability in the manner proposed by petitioner. The justification for holding employers strictly liable for the tangible adverse actions of their supervisors is that such supervisors are abusing supervisory authority granted to them by the employer. That justification does not ap['y here, where there was never any claim that Blanch took any adverse action that involved an abuse of authority delegated to her by her employer.

Petitioner goes on to argue that the Eleventh Circuit's ruling inappropriately added a requirement that the employer have "actual or constructive knowledge of the harassment by its supervisor." Pet. at 9. But that entirely misconstrues the issue presented in this case. The court of appeals did not exonerate Mini-Circuits because it lacked actual or constructive knowledge of harassing conduct by one of its supervisors -- Blanch. It held that the sole act that formed the basis of petitioner's case -- her termination -- was not illegal under Title VII because it was not motivated by discriminatory animus. In this regard, it is important to recall that the conduct of Blanch did not itself constitute the conduct forming the basis of the discrimination complaint. Petitioner did not, for example, claim that Blanch had created a "hostile work environment." Instead, she sought to recover for an action ordered by Kaylie, albeit possibly as an indirect result of Blanch's initial resignation. In that context, the issue is not "actual or constructive knowledge" of Blanch's harassment. It is whether Blanch's illegal animus can be attributed to the person, Kaylie, who took the harmful action.

II. The Eleventh Circuit's Ruling Is Entirely Consistent with the Ninth Circuit's Ruling in *Burrell v. Star Nursery, Inc.*

Petitioner is equally incorrect in arguing that there is a conflict between the ruling below and the Ninth Circuit's ruling in *Burrell v. Star Nursery, Inc.*, 170 F.3d 951 (9th Cir. 1999). That case involved a straightforward application of this Court's rulings in *Burlington* and *Faragher*. The plaintiff claimed that a supervisor had created a hostile environment through suggestive comments and that he ultimately caused her dismissal by unfairly reprimanding her. The district court had granted summary judgment for the employer because there was no evidence that the employer had actual or constructive knowledge of this conduct. The Ninth Circuit reversed, after this Court issued its rulings in *Burlington* and *Faragher* holding that actual or constructive knowledge was not required in order to hold the employer liable for actions of a supervisor.

Nothing in *Burrell* addresses the separate question presented here about the proper treatment of a situation where the action complained of -- the termination -- was not taken by the person who had the improper animus. To the contrary, *Burrell* involved claims based on two types of conduct alleged to have been undertaken *by the harassing supervisor himself.* The first was creation of a hostile work environment -- a claim that petitioner in this case did not make. The second was the claim that the harassing supervisor, the manager of the store where the plaintiff worked, "terminated her because she had resisted his sexual advances." 170 F.3d at 956. Here, petitioner cannot make that claim either, because Blanch did

not "terminate her."[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

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[3]Petitioner attempts to manufacture a conflict by pretending that the plaintiff in *Burrell*, like petitioner here, was "discharged by management, not her supervisor." Pet. at 10 (citing 170 F.3d at 954). But the cited page draws no such distinction between the supervisor's conduct and the conduct of "management." It says only that "Star Nursery" -- the corporate employer -- terminated the plaintiff. As we have noted, the court later made clear its understanding that the plaintiff was claiming to have been wrongfully terminated by the same supervisor alleged to have created the hostile work environment. It follows that *Burrell* has nothing to say about the issues presented here.